SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner

vs.

MEAD'S FINE BREAD COMPANY, A Corporation,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

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Statement

Most of the matters raised by the petitioner in his Reply Brief have been covered by respondent in its original brief and every effort possible shall be made to avoid redeveloping matters previously argued which would serve as a reply. The petitioner draws conclusions from the record throughout his reply which respondent deems wholly unjustified and utterly without support; however, the correct factual situation of this case has been reasonably well developed by respondent in its original brief and in the interest of brevity; issue will be avoided wherever possible.

every phase of tha usiness though it be wholly intrastate. He writes off com letely such authorities as: The Shreveport Case (Houston E. & W. T. R. Co. vs. U. S. 234 U. S. 342; 34 S.Ct. 833; 58 L.Ed. 1341); Mandeville Island Farms vs. American Crystal Sugar Co. 334 U. S. 219; 68 S.Ct. 996; 92 L.Ed. 1328; U. S. vs. Wrightwood Dairy Co. 315 U. S. 110; 62 S.Ct. 523; 86 L.Ed. 726; Wickard vs. Filburn, 317 U. S. 11; 63 S.Ct. 82; 87 L.Ed. 122; U. S. vs. Darby 312 U. S. 10 ; 61 S.Ct. 451; 85 L.Ed. 609; and Atlantic Co. vs. Citizens Ice & Cold Storage Co., Fifth Cir., 178 F(2) 453, Cert Den. 339 U. S. 953; 70 S.Ct. 841; 94 L.Ed. 1365, holdin ; that Federal regulation extends only to those local activ ies which in some substantial way affect interstate comm erce.

He relies upon Sun Cosmetic Shoppe vs. Elizabeth Arden Sales Corp. Second Cir., 178 F(2) 150, which completely fails him for there interstate commerce itself was the very thing utilized to commit the alleged forbidden act. In that case the plaintiff alleged that it was one of the defendant's "agencies" to sell Elizabeth Arden products at its retail cosmetic shop in the City of New York serving customers in New York and New Jersey. It alleged that the defendant had its p l ce of business in New York and sold its products broadly throughout the United States, including New York and New Jersey; and that defendant supplied some agencies in New York and New Jersey with "demonstrators" whose salaries were paid in whole or in part by the defendant; but that the plaintiff was not among those to whom the defendant furnished such a demonstrator. The trial court summarily dismissed the action on the grounds that the transactions between the parties were not in inter e commer ce and not covered by Sections 13 (d) and (e), Title 15 U.S.C.A. The Second Circuit held that under the allegation the plaintiff should be entitled to prove damages flowing

"from the diversion of its customers to those of New Jersey agencies to whom the defendant furnished demonstrators so far as that was due to the 'demonstrators' ". Clearly, interstate commerce there was utilized to enable competitor "agencies" in New Jersey to compete unfairly with the plaintiff for the New Jersey business which distinguishes it from this case. With respect to losses alleged to have resulted from competition of favored agencies in New York, the court stated that the point was not argued, but concluded that "the question would be whether it was essential to include intrastate sales in order to effectively prevent discrimination in commerce." The court further stated:

> "It would not inevitably follow that the act would have been beyond the power of Congress, even though it had expressly prescribed that a seller should not discriminate between his intrastate customers as well as between his interstate; **for it might be necessary to go so far, in order effectively to prevent discrimination between interstate customers.** If it had been necessary, the situation would be within the doctrine of the **Shreveport case**."

The court did not hold or imply that it would hold that the intrastate activity was within the prohibitive provisions of the Acts in the absence of proof that it was necessary to do so to prevent discriminations between interstate customers. In fact it makes specific reference to The Shreveport Case (supra) which brings within the Federal power intrastate activities that affect interstate commerce in such a way that Federal regulation is necessary to effectively regulate interstate commerce.

The petitioner cannot escape the proposition that in order for the Acts to apply to his case it must be made to appear that interstate commerce was either utilized or substantially

affected by the sales in the single town of Santa Rosa at the reduced price. He does not contend that the sales made by respondent in Farwell were a means to recoupe losses sustained by the sales in Santa Rosa; for if it were his argument, and if such were the facts, the respondent's efforts in that behalf fell miserably short of such an intended goal. In any event such is not the case made out by the petitioner upon the trial of this case. We have fully examined the factual situation with respect to affect and utilization of interstate commerce in our original Brief under Part A and respectfully refer the court thereto.

The above quotation taken from page ____ of the Reply Brief does conceed that an indispensable ingredient of his action is sales in commerce. This in itself condemns it during the first 3 months and 24 days of the period of the price cut unless he can show facts that would justify treating the sales of the two bakeries in Texas as though they were sales of the respondent. But even so, it must also be made to appear that the sales in the single town of Santa Rosa substantially affected interstate commerce or that such commerce was utilized in the making of such sales.

On the question of the two Texas Corporations it is most significant that the petitioner does not argue, because he cannot, that the owners of stock in respondent also owned all or a controlling interest in the Texas corporations. As petitioner states it is not clear in the record when the Big Spring corporation existed, but it is quite clear that the Lubbock, Texas, corporation was in existence during the time in question, and it is equally clear that the petitioner never at any time even inquired about its ownership other than to establish that the owners of stock in respondent also owned stock in the Lubbock, Texas, corporation. The amount or percentage was not established. He only inquired whether

or not they owned stock in the Texas corporations. Further it is not shown who the directors were or how many there were. In the absence of proof that at least one or more of respondent's stockholders owned at least a controlling, if not the entire, capital stock in the Lubbock corporation, the alter ego or instrumentality principle could not apply under the state of facts presented and set out in our Brief. That his proof falls short of that required to apply the principle is clearly demonstrated in Collins Baking Co. vs. N.L.R.B., Fifth Cir., 193 F(2) 483, cited by petitioner and relied upon by him.

That case involved an unfair labor practice charge under the National Labor Relations Act. The petitioner raised the question of the Boards jurisdiction which presented the question, simply stated, whether or not interstate commerce would be affected if, by work stoppage, the flow of materials from out-of-state were cut off. The court found that the dollar value of the interstate flow to be adequate to confer jurisdiction under the act, but to compound the matter the Circuit Court made reference to the proven fact that Campbell-Taggert, which owned 49 bakeries throughout the United States, also owned the controlling interest in petitioner in that case.

The petitioner (in our case) quotes these facts in his brief:

> "Moreover, petitioner is an integral part of Compbell-Taggert Bakery Service Corporation, which **owns** or **controls** 49 baking companies located in numerous states. **It also owns the controlling interest in petitioner's common stock—.**"

Such proof of ownership or control does not appear at all in this case.

Respondent respectfully submits that the petitioner's contention is incorrect and that if adopted the last vestige of any distinction between Federal and State authority would belong to the recorders of history.

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2. The respondent was entitled to have the jury pass upon the question of whether or not it was justified in selling its bread at the reduced price in an attempt to remain in its lawful market destroyed by the boycott.

The petitioner's contention that the defendant's defense of justification was submitted to the jury is quite erroneous and the trial court's specific instruction that,

> "If that boycott existed, I specifically instruct you, shall not specifically consider it a defense to the plaintiff's cause of action." R 233,

points up the error. While it is true that the Court let in the evidence for other purposes, he took away any benefit respondent could have gained by refusal of the requested instruction and directing the jury that the boycott could not be considered a defense.

The instructions denied the defense to the respondent with respect to plaintiff's action under Section 13(a) (Title 15 U.S.C.A.) and the error is not cured by a conjecture that the jury probably misunderstood the court's charge. Such is the effect of petitioner's argument.

The remainder of petitioner's argument fairly directed at this matter has been fully covered in respondent's original Brief.

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3. The absence of sales in interstate defeats the petitioner's action during the first 3 months and 24 days of the price cut.

Petitioner argues that when respondent terminated its sales in Farwell, Texas, on January 16, 1948, such termination was a "temporary" suspension. The record does not reflect why such sales were discontinued and, if it were material, the burden was upon petitioner to establish the necessary facts. Without the true fact a conclusion either way could be incorrect. It is, however, immaterial whether the discontinuance was permanent or temporary. The important fact is that respondent was not making sales interstate during the first 3 months and 24 days of the price cut which, as petitioner must agree, nullifies the trial court's judgment because the specific requirement of both Acts that sales be in commerce have not been met.

He complains that it would be impossible to segregate his damages if the first 3 months and 24 days of the price cut were eliminated from his action because, he poses the question:

> "Who could say whether it was the first or second half of the price war that caused him to be insolvent?"

In the first place the petitioner did not contend that he was rendered insolvent. In answer to a specific question as to his solvency on page 49 of the Record, he answered that his business was solvent. His answer must have been correct, because at page 319 of the Record there appears a Financial Statement showing his net worth to be $3,293.62 on July 31, 1949. This was three months after the price cut had been terminated. The boycott, of course, was continuing in four or five of the biggest stores in town. It is also material to note that at page 297 of the Record there appears another financial statement wherein petitioner fixes his net worth at $2,185.70 on January 31, 1948, which was about the time Mead's first entered Santa Rosa and following a period of 2 years of business without competition.

Petitioner's complaint about the record is without basis for if he was insolvent at the time he closed his business ten months after the price was raised, it was caused by something other than the price cut. In any event, insolvency is not material to the question of damages involved. His proof was limited to alleged loss of profits and value of equipment.

The Second Circuit in Sun Cosmetic Shoppe, Inc. vs. Elizabeth Arden Sales Corp. (supra) experienced no difficulty in limiting the plaintiff's damages to losses sustained,

> "from **the diversion of its customers to those New Jersey 'agencies'** to whom the defendant furnished 'demonstrators', **so far as that was due to the 'demonstrators'".** 178 F(2) at page 153.

Assuming that petitioner is entitled to recover, no problem would be encountered in properly instructing the jury on the subject.

The remainder of petitioner's applicable argument has been covered in respondent's Brief and in the first part of this Reply Brief.

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4. The petitioner has failed to prove the fact of damage.

Petitioner throughout his Reply Brief erroneously states matters of fact and draws conclusions wholly without support in the evidence. We realize that this is not intentional and have in the main taken no issue; however, respondent feels that one or two under this subject should be straightened out, so to speak.

Petitioner makes the statement at page _____ of his Reply Brief that,

> "In any event petitioner testified that the physical value of his equipment was $15,559.34 and the going con-

cern value was $23,459.34."

and refers to pages 43 and 44 of the Record.

What the petitioner said was: At R 44:

> Q. "Refresh your memory, then, from your memoranda. What was the total value of your business, including physical plant **and the good will**, as of September 1, 1948? A. $23,459.34."

The figure given included his estimate of the goodwill or going concern value, along with the physical value of his equipment.

Again on page ____ he states that the witness, Englehart, testified that the value of equipment increased rather than depreciated between 1947 and 1951. What the witness said was: At R 161:

> "I think any rise in the market value of new equipment would take care of the depreciation that had **accrued** against the equipment."

Petitioner's argument concerning the evidence of loss of value of equipment cannot stand up under the undisputed facts established by himself and his witnesses that no loss was shown. Nor can he explain his testimony concerning his alleged loss of profits wherein he refused to say that he could have made a profit in fair competition. All of the evidence and surrounding circumstances, as we have heretofore pointed out, establishes beyond any doubt that his business was not profitable in an open and fair market.

Petitioner's proof was limited to loss of profits and loss of value of equipment; and if there were other basis for a recovery, his proof should have been made thereon and submitted to the jury. This he did not do.

He speaks of "revenue" and says that he lost not only "revenue" but "profit." Just what he means by "revenue"

as distinguished from "profits" is not known. If he had other revenue, he should have offered proof of its existence and submitted the matter to the jury.

The judgment rendered by the trial court cannot stand for the reason that the petitioner failed to establish the fact of damage nor did he furnish relevant data from which his damage, if any at all, could be reasonably estimated.

The remainder of the argument has been covered in respondent's original Brief.

Conclusion

Respondent respectfully submits that the action of the Honorable Court of Appeals in reversing the trial court's judgment and directing dismissal of petitioner's action should be affirmed; and in the alternative that petitioner's recovery be limited to nominal damages or in the alternative that the cause be reversed and remanded for new trial or other relief prayed for in its original Brief.

Respectfully submitted,

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